

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Wayzata Corporate Partners, LLC,
Debtor.

Case No. 03-45135

Chapter 11 Case

**Debtor's Response to Motion By Clocktower Venture
For Administrative Expenses**

To: The United States Bankruptcy Court and the parties identified in the attached proof of service.

1. Wayzata Corporate Partners, LLC ("Debtor"), by its undersigned attorneys, submits this Response to the Motion By Clocktower Ventures For Administrative Expenses (the "Motion"), filed on August 31, 2004.

2. The Court will hold a hearing on the Motion at 10:30 a.m. on October 6, 2004 in Courtroom 8 West of the United States Bankruptcy Court, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.

Statement of Law and Argument

Clocktower Ventures ("Clocktower"), is the lessor of the real property occupied by the Debtor. During the course of the Bankruptcy Case, the Debtor assumed the unexpired lease (the "Lease") of real property to which it and Clocktower are parties. The order authorizing the Debtor's assumption of the Lease was entered on January 28, 2004.

In the Motion, Clocktower seeks allowance of an administrative expense claim in the aggregate amount of \$70,739.05, consisting of the fees and expenses associated with various professionals employed in the course of the Bankruptcy Case. Since the fees and costs for which

administrative expense treatment is sought are not recoverable either as general administrative expenses or under the terms of the parties' agreement, the Debtor objects to the Motion *in toto*, and requests that the Court enter an order denying the Motion.

1. Clocktower's Fees Are Not Administrative Expenses

In its Motion, Clocktower has asserted its the attorneys' fees and related expenses are allowable as administrative claims under Section 503(b)(1)(A), the section of the Bankruptcy Code providing that "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case" are to be accorded administrative expense status. In addition, Clocktower has briefly alluded to Section 503(b)(4)¹ as a basis for its alleged right to reimbursement of the fees.

As an initial matter, it is the Debtor's opinion that Clocktower's reliance on Section 503(b)(4) is misplaced, in that that subsection only applies to the entities enumerated in subsection (b)(3), and Clocktower's role in this Bankruptcy Case does not entitle it to treatment under that provision.

Next, Clocktower's reference to Section 503(b)(1)(A) is flawed because the Motion does not point to any benefit conferred on the estate by reason of Clocktower's participation in the case. In order to prevail on a claim under Section 503(b)(1)(A), a creditor must "demonstrate that the expenses provided a tangible benefit to the bankruptcy estate."² Clocktower has not alleged that its efforts resulted in any benefit to the estate, and has instead implied that the issue is whether the expenses were necessary to preserve its own rights and interests: "The expenses incurred by Clocktower were actual, reasonable, necessary, and directly and proximately

¹ See Motion at ¶30: "This Court should allow the legal, administrative and operating fees and expenses as an administrative claim under 11 U.S.C. §503(b)(1)(A) and (4) as a first priority claim under the provisions of 11 U.S.C. §507(a)(1)."

² *In re Williams*, 246 B.R. 591, 594 (8th Cir. BAP 1999).

occasioned by the defaults of [Debtor] in the performance of its obligations under the Lease. They were made to preserve Clocktower's right, title and interest in the Property and the Leasehold, which constituted the sole principal asset of Debtor's estate."³ There being no allegation that the fees were necessary to the preservation of the *estate's* interest in the Property, Clocktower's claim is deficient to the extent that it relies solely on Section 503(b)(1)(A).

2. Assumption-Related Obligations

The assumption of the unexpired leases is attended by certain statutory obligations found in Section 365 of the Bankruptcy Code. In particular, Section 365(b)(1) provides that:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

Although it does not specifically allege as much, Clocktower's alleged right to reimbursement for professionals' fees, being one that depends on the terms of the underlying agreement, is subject to the requirements of Section 365(b). According to the decided weight of authority, Section 365(b) "does not provide an independent right of recovery of attorneys' fees."⁴ But reimbursement of those fees by a debtor may be ordered under the authority of that section if

³ *Id.* at ¶30.

⁴ *In re Best Products*, 148 B.R. 413, 414 (Bankr. S.D. N.Y. 1992).

there is a contractual right to reimbursement: “Entitlement to attorneys’ fees under this section is conditioned on the existence of an agreement...for payment of attorneys’ fees.”⁵

In addressing the claim set forth in the Motion, therefore, the primary goal should be to give effect to the parties’ agreement, and Clocktower should be “entitled to recovery of its attorneys’ fees if the lease clearly provides for them...”⁶ As detailed below, the attorneys’ fee provision in the Lease does not provide for reimbursement of any of the fees for which Clocktower detailed in the Motion.

a. Relevant Contractual Provisions

Clocktower’s claim for administrative expense treatment appears to be largely premised on Sections 23 and 36 of the Lease, which, respectively, provide that:

If either party is required to place the enforcement of all or any part of this Lease, the recovery of possession of the Demised Premises, or damages in the hands of an attorney, or if legal proceedings are commenced by either party against the other party to protect or enforce the rights or obligations under this Lease, the prevailing party, whether as Plaintiff or Defendant, shall be entitled to recover all of its reasonable attorneys’ fees and costs.

and

[Debtor] agrees to defend, indemnify and hold harmless [Clocktower] from all claims of liability as well as liability, regardless of nature or extent, real or threatened, occasioned by or arising out of [Debtor’s], its employees’, agents’, invitees’ and guests’ use and occupancy of the Building.⁷

b. The Indemnification Provision is Inapplicable

With respect to the quoted provisions, the issue before the Court should first be narrowed to consideration of Section 23 of the Lease, as Section 36 should be deemed irrelevant. “In interpreting contracts, [Minnesota courts] apply the principle of ejusdem generic, which states that ‘[g]eneral words are construed to be restricted in their meaning by preceding particular

⁵ *Id.*

⁶ *In re I-Mind Education Systems, Inc.*, 269 B.R. 47, 48 (Bankr. N.D. Cal. 2001).

⁷ See Motion at ¶13.

words.”⁸ With respect to the Lease, therefore, the general right to indemnification, being one that does not specifically provide for the recovery of attorneys’ fees should be limited by the more specific attorneys’ fee provision found in Section 23. Furthermore, Clocktower’s own allegation that “[t]he expenses incurred by Clocktower were actual, reasonable, necessary, and directly and proximately occasioned by the defaults of [Debtor] in the performance of its obligations under the Lease,”⁹ implicates the provision of the Lease that is specifically related to the enforcement of the agreement.

In addition, since Section 23 explicitly contemplates the recovery of attorneys’ fees, the omission of any reference to fees in Section 36 indicates that fees are not recoverable solely by operation of the general indemnification provision. That the contract includes a particular reference to attorneys’ fees in Section 23, but not in Section 36 must be considered significant. If Section 36 applied to Clocktower’s claim for attorneys’ fees, Section 23 would be rendered mere surplusage in that there would not be any costs or expenses recoverable under Section 23 that were not already recoverable under Section 36. Clocktower’s interpretation of the Lease, therefore, contravenes “the cardinal rule of construction that any interpretation which would render a provision meaningless should be avoided on the assumption that the parties intended to the language used by them to have some effect.”¹⁰

Finally, to the extent that the provisions of Sections 23 and 36 might either conflict or overlap, there is an inherent ambiguity in the Lease. “A fundamental principle of contract law is that when contract language is reasonably susceptible of more than one interpretation it is ambiguous, and ambiguous contract terms must be construed against the drafter.”¹¹ As

⁸ *Brookdale Pontiac-GMC v. Federated Insurance*, 630 N.W.2d 5, 10 (Minn. App. 2001) (citations omitted).

⁹ See Motion at ¶30.

¹⁰ *Independent School District No. 877 v. Loberg Plumbing & Heating*, 123 N.W.2d 793, 799-800 (Minn. 1963).

¹¹ *Hilligoss v. Cargill*, 649 N.W.2d 142, 148 (Minn. 2002).

Clocktower was responsible for the drafting of the Lease¹², it should not be allowed to evade the operation of an express condition by resort to a more vague and open-ended provision.

c. Clocktower Did Not Prevail in Enforcing the Lease

Turning to Section 23, the unequivocal intent of that provision of the Lease is that the Debtor should be obligated to pay Clocktower's fees if: (i) the fees were incurred in the enforcement of the Lease; and (ii) Clocktower was a "prevailing party." In light of these conditions, none of the fees described in the Motion are recoverable from the Debtor.

As a threshold matter, the only fees that are reimbursable under Section 23 of the Lease are those necessary to the enforcement of the parties' agreement. The purpose of this sort of provision is to require that a non-breaching party will be reimbursed for costs and expenses incurred as a result of the other party's breach:

The recovery of attorney fees, then, is logically limited to those accrued in legal proceedings to address the breach. These provisions do not authorize a landlord to retain counsel at the tenant's expense just to monitor the tenant's business operations and options, or to assess the likelihood that the tenant will perform on the lease in the future...If a landlord retains counsel under such circumstances, the resultant fees are chargeable to its own general cost of operations; they are in no way chargeable to a tenant that is not in default, absent very specific provisions in the lease.¹³

From the outset of the Bankruptcy Case, the Debtor acknowledged that the filing of certain mechanics' liens resulted in defaults under the Lease. Indeed, the Bankruptcy Case was filed primarily for the purpose of preserving the Debtor's leasehold interest, and the most significant portion of the case was devoted to litigation intended to have the value of those liens determined before they would be satisfied. Had Clocktower incurred fees in compelling the Debtor to have the liens released, it may well have a legitimate basis for seeking reimbursement. But such a purpose is only peripherally alleged in the Motion, and a review of the itemization of

¹² See Declaration of David Luse at ¶3.

¹³ *In re Exchange Resources, Inc.*, 214 B.R. 366, 370 (Bankr. D. Minn. 1997).

the fees clearly reveals that the vast majority of the fees were not designed to effect that result. It is not enough for Clocktower to allege that it incurred its attorneys' fees "as a result of" defaults, or that the fees were "proximately occasioned" by defaults. Instead, as is required under the Lease, Clocktower must demonstrate that the fees were necessary to address specific breaches of the agreement.

Based on the interpretation implicit in Clocktower's Motion, though, the clear limitations on the reimbursement of attorneys' fees are meaningless, and any default would support an unlimited demand for fees that are not even remotely related to that default. Such an open-ended reading is neither consistent with the plain terms of the parties' agreement, nor with recognized policy regarding awards of attorneys' fees: "Provisions granting creditor's attorney's fees must be strictly construed to not contradict the traditional American Rule that parties bear their own fees and costs."¹⁴

There is no indication that Clocktower regarded the Lease as setting some sort of parameters on the scope of compensable fees, or tailored its pleadings to address the contractual terms. The itemization of Clocktower's fees is rife with entries that have nothing whatsoever to do with "enforcement" of the Lease, and to allow reimbursement of the full range of fees detailed in the Motion would be tantamount to sanctioning landlords' general right to "a blank check upon the estate of the debtor for attorneys' fees."¹⁵

Even if some of Clocktower's fees were related to the Debtor's breach of the Lease so as to trigger the attorneys' fee provision, the relief sought in the Motion must be denied in whole for another reason. Specifically, Clocktower does not, nor could it, allege that it is a "prevailing party" for purposes of Section 23 of the Lease. Although Clocktower was generally adverse to

¹⁴ *Id.*

¹⁵ *In re Bullock*, 17 B.R. 438, 439 (9th Cir. BAP 1982).

the Debtor throughout the Bankruptcy Case, it cannot be said that it prevailed on any matter, let alone those matters that might have related to enforcement of the Lease. It is true that Clocktower did object to both the Debtor's motion for an extension of the time within which the Lease would have to be assumed or deemed rejected, as well as the Debtor's motion to assume the Lease, and that Clocktower sought relief from the automatic stay in order to exercise rights under the Lease.

But these actions would appear to be the only ones that could be characterized as proceedings related to the enforcement of the Lease, and Clocktower did not succeed in any of them. To the extent the assumption-related motions were contested, the Debtor's eventual assumption of the Lease precludes a determination that Clocktower "prevailed." In addressing a claim similar to Clocktower's, one court opined that it is the final resolution of the assumption proceedings that dictates the determination of which party prevailed. In that case, the landlord "was not the 'successful party' in that the lease was ultimately assumed by the debtor."¹⁶ The same is true with respect to Clocktower's lift stay motion, which was voluntarily withdrawn.

According to the well settled law regarding reimbursement of attorneys' fees in lease assumption cases, an award should only be ordered if the parties' contract provides for it. Granting the relief sought in the Motion, absent any showing that Clocktower prevailed in any action to enforce specific contractual provisions, would necessarily require that an important condition to the award of fees be effectively written out of the agreement.

3. Clocktower's Fees Are Not Reasonable

If the application of fundamental contract law does not preclude Clocktower's recovery of any portion of its fees, the Debtor believes that the vast majority of those fees should still be disallowed as unreasonable. As one court has formulated the relevant inquiry:

¹⁶ *In re Mid American Oil, Inc.*, 255 B.R. 839, 842 (Bankr. M.D. Tenn. 2000).

the following three-prong test should apply when approving reimbursement of attorneys' fees in connection with an assumed lease: (i) Does the expense directly or indirectly related to a default under the lease; (ii) if so, was the expense necessary to cure the default, adequately protect the landlord against future defaults, or indemnify the landlord against loss; and (iii) if so, was the expense reasonable under the circumstances?¹⁷

Applying the foregoing analysis to the issue before the Court, it is clear that most of the fees fail at least one of part of the test. The following charts summarize the Debtor's characterization of Clocktower's fees, and the basis for disallowance of each:

Analysis of Fees of The Johnson Firm, P.L.L.C.

Invoice Date	Invoice No.	Summary of Itemized Services	Grounds of Debtor's Objection	Amount of Fees & Costs
August 11, 2004	10239	Services related to post-judgment issues.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$1,656.99
February 20, 2004	10208	Services related to trial preparation.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$3,564.00
January 12, 2004	10193	Services related to trial preparation and attendance at trial.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$8,821.41
November 30, 2003	10175	Services related to review and analysis of adversary pleadings.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$5,060.00
August 12, 2004	10241	Services related to review of and objections to Plan and	Not related to Debtor's default under the lease and not	\$4,512.73

¹⁷ *In re Westworld Community Healthcare, Inc.*, 95 B.R. 730, 734 (Bankr. C.D. Cal. 1989).

		Disclosure Statement; preparation of lift stay motion.	reasonably necessary to protect lessor's interests.	
February 20, 2004	10209	Correspondence regarding lease default and plan of reorganization.	With the possible exception of matters related to the Debtor's alleged post-assumption default, not related to default and are not reasonably necessary to protect lessor's interests.	\$616.53 - total (up to \$249.93 may be allowable)
November 30, 2003	10174	(1) General bankruptcy administrative matters; (2) Lease assumption matters; (3) Secured claim matters; and (4) Post-petition finance matters.	With the possible exception of lease assumption matters, not related to default and are not reasonably necessary to protect lessor's interests.	\$3,121.72 - total (up to \$400.00 may be allowable)
September 30, 2003	10164	General bankruptcy matters	With the possible exception of lease assumption matters, not to related to default and are not reasonably necessary to protect lessor's interests.	\$10,165.00 total (up to \$360.00 may be allowable)
August 12, 2004	10242	State court matters	Not reasonably necessary to protect lessor's interests.	\$6,915.17
February 28, 2004	10221	State court matters	Not reasonably necessary to protect lessor's interests.	\$619.41

Analysis of Fees of C. Scott Massie

Invoice No.	Summary of Itemized Services	Grounds of Debtor's Objection	Amount of Fees & Costs
3332	Services related to Disclosure Statement and Plan; Settlement of State court action.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$320.00
3266	Services related to lift stay motion and Disclosure Statement	With the possible exception of some portion of the fees related to the lift stay motion, not related to Debtor's default under	\$2,340.00

		the lease and not reasonably necessary to protect lessor's interests.	
3219	Appears to consist entirely of entries appearing on Invoice No. 3266	Duplicative of other entries	\$2,110.00
3085	State court matters and review of bankruptcy court judgment.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$676.15
3018	Pre-trial matters (adversary proceeding); attendance at hearing and trial.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$4,981.80
2943	Review of discovery materials and matters related to 341 meeting.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$1,060.00
2878	Preparation for and attendance at hearing on motion to extend time to assume or reject; review of loan documents.	With the possible exception of assumption related matters, not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$1,450.00 total (up to \$1,120 allowable)
2814	unknown	Do not appear to be related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$760.00
2751	Review of adversary proceeding documents; correspondence and conferences.	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$1,100.00
2690	Review of motion and bankruptcy file; correspondence and conferences.	With the possible exception of assumption related matters, not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$600.00
2631	Services related to treatment of liens in bankruptcy	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$420.00
2630	unknown	Do not appear to be related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$140.00

3086	State court action matters, including drafting of answer and complaint	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$1,680.00
3144	State court matters	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$2,083.00
3267	State court matters	Not related to Debtor's default under the lease and not reasonably necessary to protect lessor's interests.	\$2,255.00

In sum, the Debtor's position with respect to Clocktower's fees is that they are primarily unreasonable in that very few of them were incurred for the purpose of compelling the Debtor to cure any particular default. If Clocktower would have come forward and demanded that the Debtor's defaults be immediately cured, there is no doubt that some arrangement could have been worked out under which its involvement in the case could have been minimized while its interests would be fully protected. Instead, Clocktower chose to insert itself into nearly every facet of the Bankruptcy Case. It may be that its approach to the case was practical and reasonable, but whether Clocktower's interests were best served by its involvement in the case is far from dispositive of its rights to recover attorneys' fees. As the *Exchange Resources* opinion counsels, the fact that landlords may have legitimate reasons to monitor and participate in a bankruptcy case does not mean that all of those fees are compensable.

Conclusion

Clocktower's Motion presents a compelling example of the sort of overreaching that must be the central concern whenever attorneys' fee provisions are at issue. Of course, this case is relatively easy in that the parties' agreement simply cannot be construed so as to provide for the recovery of the fees referenced in the Motion. Rather than presenting its case through reference to the terms of the parties' agreement, Clocktower's Motion, therefore, would seem to implicitly

advocate a statutory requirement that a debtor-tenant reimburse its landlord for all attorneys' fees that the landlord incurs in the course of a bankruptcy case.

In short, Clocktower has not alleged facts that would be necessary to demonstrate either one of the two conditions that must be satisfied before the attorneys' fee provision of Section 23 would become operative. The failure of the Motion to allege those facts renders Clocktower's claim facially deficient, and there is no need to assess the reasonableness of any of the itemized fees. If, however, the Court determines that some portion of Clocktower's fees are compensable under the terms of the agreement, the Debtor believes that recovery should be limited to those fees that were reasonably necessary to address specific defaults, and Clocktower should be called on to present evidence demonstrating the relationship of particular services to the enforcement of the agreement.

WHEREFORE, the Debtor respectfully requests that the Court enter an order denying Clocktower's Motion and granting such further relief as may be deemed just and equitable.

HENSON & EFRON

Dated: September 29, 2004

/s/ William I. Kampf
William I. Kampf (#53387)
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Attorneys for Debtor

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Wayzata Corporate Partners, LLC,
Debtor.

Case No. 03-45135

Chapter 11 Case


**Unsworn Declaration in Support of
Debtor's Response to Motion By Clocktower Venture
For Administrative Expenses**

David Luse makes the following Unsworn Declaration.

1. I am the Chief Manager of the Debtor.
2. I have personal knowledge of all matters herein referenced.
3. The Lease Agreement dated September 25, 2002 and entered into by the Debtor and Clocktower Ventures was drafted entirely by Clocktower Ventures.

I declare under penalty of perjury that the foregoing is true to the best of my knowledge, information, and belief.

Dated: 9/27/04


David Luse

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 03-45135

Wayzata Corporate Partners, LLC,

Debtor.

PROOF OF SERVICE

The undersigned states that she is an employee of Henson & Efron, P.A., and in the course of said employment, on the date indicated below, she served the following:

**Debtor's Response to Motion by Clocktower Venture for Administrative Expenses;
Unsworn Declaration in Support of Debtor's Response to Motion by Clocktower Venture
for Administrative Expenses; and Proof of Service**

on the entities named below and/or on the attached service by enclosing true and correct copies of same in an envelope, properly addressed and postage prepaid, and depositing same in the United States mail, unless otherwise noted; and that she certifies the foregoing under penalty of perjury.

United States Trustee
300 South Fourth Street
1015 U.S. Courthouse
Minneapolis, MN 55415
Fax: 612-664-5516

Law Office of C. Scott Massie
1055 East Wayzata Blvd
Wayzata, MN 55391
Via Fax: 952-475-0311

Dale Ossip Johnson
609 Castle Ridge Rd #318
Austin, TX 78746
Fax: 512-328-0347

Dated: September 29, 2004

/e/ Tawney Jameson